United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Original + Affidavit of Mailing

77-6014

To be argued by
LEONARD SCLAFANI

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-6014

P/S

PETER COLLASO, CHARLOTTE L. COLLASO, PETER CHARLES COLLASO, JOSEPH CARL COLLASO, JANE CAROL COLLASO, DAVID CHRISTOPHER COLLASO, MARY CHARLOTTE COLLASO & PAUL MICHAEL COLLASO,

Plaintiffs-Appellants,

—against—

DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, UNITED STATES GOVERNMENT,

Defendant-Appellee.

UNITED STATES COURT OF APPEALS
FILED
MAY 19 1977
DANIEL FUSARO, CLERK
SECOND CIRCUIT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

ALVIN A. SCHALL,
LEONARD SCLAFANI,
Assistant United States Attorneys,
Of Counsel.

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Docket No. 77-6014

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Plaintiffs-Appellants,

—against—

DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, UNITED STATES GOVERNMENT,

Defendant-Appellee.

BRIEF FOR THE APPELLEE

Preliminary Statement

This is an appeal by Peter Collaso from an order of the United States District Court for the Eastern District of New York (Costantino, *J.*) dismissing appellant's suit on the ground that it was barred under Title 28, United States Code, Section 2401(b).[1]

Appellant brought this action apparently pursuant to the Federal Tort Claims Act, Title 28, United States Code, Sections 1346(b) and 2671 *et seq.*, alleging that appellee, the Department of Health, Education and Welfare,

[1] This case carries the title indicated above. However, although Peter Collaso and the named members of his family signed the original complaint in the district court, only Peter Collaso is appealing the order of the district court.

had negligently administered the payment of disability insurance checks to which appellant claimed he was entitled. By order dated April 21, 1976, the district court determined that appellant had neither timely commenced a civil action against appellee nor timely filed with appellee an administrative claim for damages; accordingly, the court dismissed appellant's action as time barred.

Statement of the Case

On November 1, 1974, appellant Peter Collaso filed a complaint in the District Court for the Eastern District of New York seeking money damages against appellee, the Department of Health Education and Welfare, in the amount of $200,000 and alleging that appellee had negligently stopped or delayed payment to him of social security disability checks to which he claimed entitlement. *Collaso* v. *Department of Health, Education and Welfare*, Docket No. 74 C. 1560 (U.S.D.C., E.D.N.Y.).

This action was dismissed with prejudice by stipulation of the parties on April 15, 1975. However, on March 3, 1975, appellant submitted to appellee an administrative claim for damages on Standard Form 95 based upon the same allegations of negligence which had given rise to the dismissed action (A.-3).[2]

On July 2, 1975, appellee denied appellant's claim on the ground that the acts complained of by appellant were not the result of negligence on the part of the United States, its agents or employees (A.-5).

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[2] References preceded by the letter "A." are to page of appellee's appendix.

Appellant had previously corresponded by letter with appellee concerning his entitlement to benefit checks but it was not until January 21, 1971, that appellant actually requested money damages or alleged any negligence on the part of appellee (A.-1).

Subsequently, on July 22, 1975 appellant commenced the instant action in the district court. On April 21, 1976, however, having determined that appellant's action was time barred under Title 28 United States Code, Section 2401(b), the district court dismissed appellant's complaint (A.-10).

It is from the district court's order of dismissal of April 21, 1976 that appellant appeals.

ARGUMENT

The District Court Lacked Jurisdiciiton Over Appellant's Action.

Although appellant's complaint does not allege the basis for the district court's jurisdiction over this litigation,[3] it is apparent from the pleadings, and the court below found, that if appellant's action was cognizable at all, it was so under the Federal Tort Claims Act, Title 28, United States Code, Sections 1346(b) and 2671 *et seq.* Not only is the complaint couched in language suggesting negligence, but, in addition, prior to commencing the action, appellant filed with the Department of Health, Education and Welfare a claim for damages in accordance with the statutorily mandated procedures for initiating a suit in tort against the United States.

Accordingly, inasmuch as appellant's cause must be considered as having been filed under the Federal Tort Claims Act, the limitations of time governing actions commenced under the Act must likewise govern the action. We submit that an application of these time limita-

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[3] A defect which, in and of itself, could have resulted in dismissal of the action. See Rule 8(a) Fed. R. Civ. Pro. and, generally, 2A Moore's Federal Practice ¶ 8.0 (2d Ed. 1975).

tions to the case at bar makes it very clear that the action was not timely commenced and is therefore barred.

The period of time within which a claim in tort against the United States must be prosecuted depends upon when the action accrues. *Katzer* v. *United States*, 342 F. Supp. 1088 (E.D.Wis. 1972); *Winston Bros. Company* v. *United States*, 371 F. Supp. 130 (D.C. Minn. 1973). As a result of an amendment to the Federal Tort Claims Act, Pub. L. 89-506, 80 Stat. 306 (1966), there is one period of limitations for claims accruing prior to January 18, 1967, and another for claims accruing on that date or thereafter.[4]

For causes of action against the United States based on tort, accruing prior to January 18, 1967, Section 2401 (b) of Title 28 of the United States Code provides:

> A tort claim shall be forever barred unless action is begun within two years after such claim accrues . . .

With regard to claims accruing on January 18, 1967 and thereafter, Title 28, United States Code, Section 2401(b), as amended in 1966, provides in pertinent part:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues. . . .

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[4] The 1966 amendment to the Federal Tort Claims Act provides:

> Section 10—This Act shall apply to claims accruing six months or more after the date of its enactment.

Pub. L. 89-506, 800 Stat. 306 (1966).

The date of the enactment of this amendment was July 18, 1966.

From the above, it is clear that for both a claim accruing prior to January 18, 1967, and a claim accruing on or after that date, the time period within which some action, either the commencement of a lawsuit in the district court or the filing of an administrative claim, must be begun in two years from the date on which the claim arose.

It is significant to note that compliance with the appropriate time limitations imposed by the Federal Tort Claims Act is a jurisdictional prerequisite to the maintenance of a suit under the Act. Since the Federal Tort Claims Act both created a cause of action previously unknown at common law and, at the same time, imposed a time limitation upon the right thereby created, the failure fully to comply with that time limitation not only bars any remedy under the Act, but also extinguishes the right of action itself. *Simon* v. *United States*, 244 F.2d 703 (5th Cir. 1957); *Andregg* v. *United States*, 171 F.2d 127 (4th Cir. 1948).

Thus, unless compliance with the time limitations imposed by Section 2401(b) of Title 28, United States Code, is fully pleaded and firmly established, a court is without jurisdiction to consider a suit brought pursuant to the Federal Tort Claims Act.

It is submitted that appellant herein has not so complied with the provisions of Section 2401(b) and that, accordingly, the district court was correct in dismissing the suit. The gravemen of appellant's complaint is that between December 5, 1965, and September, 1968, the Social Security Administration, after awarding appellant disability benefits, negligently delayed or stopped the payments of some of his benefit checks. (A.-6).

Even considering the allegations of appellant in a light most favorable to him,[5] these allegations reveal that the last day on which a negligent delaying or stoppage of payment could have occurred was September 30, 1968.

Therefore, applying the law as above outlined to this litigation, to the extent that any of appellant's checks were delayed or stopped between December 5, 1965 and January 18, 1967, appellant would have had to commence an action in the district court on or before January 18, 1969, in order to maintain an action under the Federal Tort Claims Act. And, to the extent that payment of any of appellant's checks was stopped or delayed between January 18, 1967 and September 30, 1968, appellant would have had to file an administrative claim with the Department of Health, Education and Welfare no later than September 30, 1970, in order to vest jurisdiction in the District Court over the action.

In point of fact, appellant did not commence an action against the United States or the Department of Health, Education and Welfare alleging the Department's negligence in stopping or delaying payment of benefit checks until November 1, 1974. The present action was commenced on July 22, 1975. Nor did appellant file an administrative claim with the Department of Health, Education and Welfare on Standard Form 95, as provided in 45 C.F.R. § 35.2, the regulation which outlines the formal requirements of an administrative claim, seeking recovery for the alleged negligent acts of that agency, until March 3, 1975.

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[5] As, indeed, the court below was compelled to do. *Gardner* v. *Toilet Goods Ass'n*, 387 U.S. 167 (1967); 2A Moore's Federal Practice ¶ 12.15, at 2342 (2d Ed. 1975).

Moreover, while it is true that prior to March 3, 1975, appellant corresponded by letter with the Department of Health Education and Welfare concerning his disability benefit checks, even assuming that this correspondence could be construed as an administrative claim, the first of these letters which even remotely satisfies the requirements of 45 C.F.R. § 35.2, was dated January 21, 1971.[6]

It is clear then that appellant did not timely file his action in the district court nor did he timely file an administrative claim with the Department of Health, Education and Welfare.

Accordingly, the district court was without jurisdiction to consider appellant's case.

CONCLUSION

The judgment dismissing the complaint against appellee should be affirmed.

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York

ALVIN A. SCHALL,
LEONARD SCLAFANI,
Assistant United States Attorneys,
Of Counsel.

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[6] Apparently it was this letter which the district court found was an administrative claim.

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

Barbara Allen being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 19 day of May 19 77 he served a copy of the within

BRIEF FOR THE APPELLEE

by placing the same in a properly postpaid franked envelope addressed to:

Peter T. Collaso, 798 E. 22nd St., Brooklyn, N.Y. 112010

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

Barbara Allen

Sworn to before me this
19th day of May 1977

Carolyn N. Johnson

CAROLYN N. JOHNSON